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No. 96-691

Supreme Court, U.S.
FILED
DEC 17 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

YOUNIS BROS. & CO., INC.,

Petitioner,

vs.

CIGNA WORLDWIDE INSURANCE COMPANY,

Respondent,

-and-

THE ABI JAOUDI AND AZAR TRADING CORPORATION,

Petitioner,

vs.

CIGNA WORLDWIDE INSURANCE COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

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14 pp

Respondent claims that the Petition only asserts "unreviewable state law claims, routine hearsay evidentiary issues and moot jury questions.[1] That characterization ignores the Petitioners' claim that the trial court's actions curtailed Petitioners' right to a jury trial, a right guaranteed under the Seventh Amendment, *Beacon Theatres v. Westover,* 359 U.S. 500, 3 L. Ed. 988 (Question 4 and 5); and, was an abuse of the lower court's discretionary powers, *Supervisors, Rock Island Co. v. United States,* 71 U.S. 534, 18 L. Ed. 419 (Question 6).

CIGNA contends that the Court cannot reach these issues because they are moot. It argues, they are moot because the "the petitioners did not prove their bad faith claims at all," page 11. That statement is incorrect. Petitioners proved bad faith, which Respondent conceded on page 4: "The jury, surprisingly, returned a verdict for the petitioners on the coverage and bad faith claims." Even the perfunctory opinion of the Third Circuit did not hold those issues moot, or unnecessary to address.[2]

The subsequent action of the lower court, in substituting its view of the evidence for the Jury's findings, should not deprive the Petitioners from seeking a review of the lower court's improper curtailment of their right to a jury trial. To hold otherwise, would mean that review of constitutional issue of improperly infringing on a jury's function can be avoided by usurping it.

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1. Respondent's Brief in Opposition, Counter Statement of the Question Presented, page i.

2. It found that the pronouncement of a new requirement to prove bad faith (outrageousness); the holding that there is no right to damages if an insurer act in bad faith in the investigation and adjustment of a claim; the curtailment of the Petitioners right to a jury trial; the interpretation of judicial discretion as allowing a reconsideration of facts decided by a jury; and, the interpretation of a statute in a manner the Pennsylvania Supreme Court has ruled would be unconstitutional, required no comment, other than "the other allegations of error . . . have no merit . . ." footnote 1.

It is respectfully submitted, assuming, *arguendo*, that the granting of the judgment n.o.v. could render those question moot that fact would be a basis for this Court to decide whether the judgment was proper. Petitioners should not be denied a review of the Seventh Amendment issue by the entry of judgment n.o.v., if granting that judgment was erroneous.

CIGNA argues that the Petition lacks broad public import and is of limited pertinence. These cases meets those criteria. At a time when the jury system is under criticism, it is essential that this Court again emphasize the importance of maintenance of the jury as the fact-finding body, *Beacon Theatres, supra,* U.S. at 501.

In these action that function has been attacked in three separate ways: The trial court limited the issues it would allow the jury to decided (Appendix D, page 63a); it conducted an "independent review of the evidence" (Appendix A, page 45a) and held that despite the jury's finding of bad faith it would not award the damages allowed by statute; and, it reversed the jury's determination of disputed questions of fact and the inference that could be drawn from proven facts (Appendix B, page 22a).

The jury found, as Petitioners have always maintained, that the Respondent failed to prove that the "war risk exclusion" was applicable. While CIGNA established that there was fighting and chaos in Liberia, it failed to prove that there was an intent to seize control of the government and exercise its powers.

The lower court clearly indicated that the evidence it relied on in deciding that issue, was the hearsay testimony of Mark C. Huband (Appendix B, page 21a).[3] That testimony, characterized

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3. The Third Circuit did not state what evidence it viewed as establishing that Taylor and/or Johnson "intended to overthrow the government and seize power (Appendix A, page 4a)." However, all the evidence on that issue was summarized in the Petition, pages 5 and 6. That summary was not disputed by Respondent.

by CIGNA as "uncommonly reliable" was, through cross examination, proven unreliable and/or untruthful (Petition, page 6). And, absent that testimony there is no basis to sustain the lower court's action.

The chaos that existed in Liberia does not equate to "war" within the meaning of CIGNA's policies exclusions. Yet, both the lower court[4] and the Third Circuit[5] viewed the level of chaos as "proving" there was an insurrection. While those courts believe that the events allow but one conclusion, the Court in Liberia has reached a different conclusion.

On December 2, 1996 the trial court in Liberia issued rulings in four cases pending before it. Respondent herein is also the Respondent in those actions. In those cases, after considered Respondent's arguments, the court, citing American law, denied Respondent's motions, holding:

> In proving that the losses fall under the war risk exclusionary clause, the Defendant is required to prove that the only reasonable inference from the hostilities in Liberia at the time of each of the losses occurred, is that one or more of the parties to said hostilities intended to seize control of the Government of Liberia and exercise its powers.

Bridgeway Corp. v. CIGNA Worldwide Ins. Co., Alliance Motor Corporation v. CIGNA Worldwide Ins. Co., and, *H & A Enterprises v. CIGNA Worldwide Ins. Co.* Appendix K.[6]

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4. "The issue before this Court is whether as a matter of law that turbulence rose to the level of insurrection . . ." Appendix B, page 20a.

5. ". . . numerous witnesses testified to the objective manifestations of the intent . . . " Appendix A, page 4a.

6. Because the fourth case, *Fouani Bros. Corp v. CIGNA Worldwide Ins. Co.*, also dealt with other issues a separate opinion was issued, which incorporated, verbatim, the holding of *Bridgeway, supra.*

The court held: "It is the Jury, which . . . must hear the evidence and decide whether the hostilities constitute war . . ."

The court cited the second *Mano* opinion in holding that "[t]he court cannot take judicial notice that the hostilities constituted war." Hence the Court has now clearly indicated that the interpretation CIGNA ascribed to the original *Mano* decision "the [Liberian] Supreme Court took judicial notice that those events constituted a civil war, *not* a civil commotion," Appendix H, 100a-101a, was incorrect.

The subsequent rulings by the Liberian courts indicate that lower court was incorrect when it stated it would "reach the same result applying Liberian law" Appendix B, page 25a. As set forth in the Petition, page 9, the *Mano* decision was the catalyst for the lower court's action sixteen months after the jury made its findings. That mistaken belief and, Petitioners assume, a desire for uniformity of decision, to avoid forum shopping and the unequitable administration of the law, undoubtedly influenced the lower court's reasoning.

Respondent's brief, page 5, in addressing what effect should be given to the holding of the Liberian Supreme Court's final decision in the *Mano* case, misstates Petitioners' argument in the lower court;[7] and, questions "the validity of the opinion."[8]

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7. Petitioners did not argue that the doctrine was "inapplicable" or "without legal effect." Petitioners position was that there was "no basis for that decision being given conclusive effect;" and, that "the issues confronted by the Liberian Court were different than the one decided by this Court. In *Mano* there was no issue of whether the Plaintiff's losses occurred as a result of the civil war."

8. Unlike America, in Liberia the Justices of the Supreme Court are appointed for a term of years, not life. Respondent does not suggest that the "reconstituted, restructured court" was not properly and duly appointed; or, provide any basis for asserting that this Court should question the validity of the final decision of the Liberian Supreme Court.

The second *Mano* opinion (Appendix G) states the standard of causation that must be used in Liberia. The original *Mano* opinion (Appendix F) was ambiguous as to what the court was holding. It was Petitioners' contention that the Liberian Supreme Court was not deciding if a civil war occurred; nor if the losses were caused by a civil war;[9] and, therefore was not applicable to the issues before the lower court. The second *Mano* opinion (Appendix G) has no ambiguity and is clearly applicable to the issues present in these cases.

CONCLUSION

For all of the reasons both set forth above and in their Petition, Younis Bros. & Co., Inc. and The Abi Jaoudi and Azar Trading Corporation respectfully request that this Honorable Court issue an order granting a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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9. The issue the Liberian Supreme Court stated it was considering was "[w]hether the performance under the contract was excused by the civil war (Appendix F, page 77a)."

APPENDIX K — COURT'S RULING

TEN DAY'S CHAMBERS SESSION
MONDAY, DECEMBER 2, 1996
SEPTEMBER TERM, A.D. 1996

SIXTH JUDICIAL CIRCUIT COURT,
MONTCERRADO COUNTY
SITTING IN THE SEPTEMBER TERM, A.D. 1996

In Re: (1) BRIDGEWAY CORPORATION, PLAINTIFF VERSUS CIGNA WORLDWIDE INSURANCE COMPANY, DEFENDANTS, (2) ALLIANCE MOTOR CORPORATION, PLAINTIFF VERSUS CIGNA WORLDWIDE INSURANCE COMPANY, DEFENDANT, AND (3) H & A ENTERPRISES VERSUS CIGNA WORLDWIDE INSURANCE COMPANY, DEFENDANT, ACTION OF DAMAGES FOR BREACH OF CONTRACT.

Court's Ruling on Disposition of Law Issues

Pleadings having rested, the four (4) Motions to Dismiss consolidated, disposed of and assigned for the Disposition of Law Issues, the Cases (1) Bridgeway Corporation versus Cigna Worldwide Insurance Company, (2) Alliance Motor Corporation versus Cigna Worldwide Insurance Company, and (3) H & A Enterprises versus Cigna Worldwide Insurance Company was also Consolidated, when called for the disposition of Law issues because they contain Common issues.

The first issue of law is on the timely filing of claim. Generally, Insurance law provides that there is one school of thought which holds that untimely filing of claim is ground to disclaim liability, while there is another school of thought which holds that the delay in filing claim merely postpones the time

of settlement. 45 Am Jur 2nd, *Insurance*, section 1331. In fact it is also law that requesting additional proof of law, as the Defendant did in each of these cases, is waiver of objection that proof of loss was not timely furnished. 43 Am Jur 2nd, *Insurance*, Section 1331. However, as stated in the Ruling on the Motion to Dismiss, the Defendant, a foreign Insurance Company who conducted business in Liberia through an Agent, did not have an Agent in Liberia at the various dates of the losses up to date of filing of these actions, in violation of the Insurance Law of Liberia, Section 4, *Insurance,* Law of Liberia. Of course, the absence of a Defendant from Liberia tolls the statute for commencement of an action until said Defendants returns to Liberia. Section 2.70(1), Civil Procedures Law.

In the light of these Liberian Laws and the Defendant's conduct, it is the Jury which, as trial of the facts, must decide whether the Defendant can, in good faith, benefit from its defense of untimely filing of claims against it.

The second legal issue relates to the war risk exclusion clause; and there is no disagreement between the parties as to the laws which govern. That is, the burden of proof is upon the Defendant, as the insurer, to prove that the losses fall under the exclusionary clause, as Liberian law provides that he who alleged the existence of a fact should prove it beyond reasonable doubt. Section 25.5(1), Civil Procedure Law, 1 LCLR page 198. General principles of Insurance Law provides that an insurer seeking to defeat a claim because of an exception or limitation in the policy has the burden of proving that the loss, or part of thereof, comes within the purview of the exception or limitation set up. 44 Am Jur 2nd, *Insurance*, section 1330.

On the other hand, the burden of proof is the Plaintiffs to

each prove the quantum of loss sustained. The insurance being for indemnification of the insured when the loss occurs, it is the insured who must prove the quantum of loss. The liability of the insurer is limited to the obligation to pay the actual loss sustained, which will indemnify the insured, not to exceed the amount of the policy. 44 Am Jur, *Insurance,* Section 1500. So it is not enough for the insured to merely show the amount of insurance coverage, the insurer must also show and prove that the loss falls within the provision of the insurance policy. 43 Am Jur 2nd, *Insurance,* section 1101.

In praying that the losses fall under the war exclusionary clause, the Defendant is required to prove that the only reasonable inference from the hostilities in Liberia at the time each of the losses occurred, is that one or more of the parties to said hostilities intended to seize control of the Government of Liberia and exercise its powers. The Defendant must also prove that such hostilities were the direct cause for each of the losses. *Holiday Inns Inc. v. AETNA Insurance Company,* 571 F. Supp. 1460 (1983); *Pan American World Airlines Inc. v. AETNA Casualty and Surety Company,* 505 F.2d 989 (1974), *Home Insurance Company of New York v. Davilla,* 212 F.2d 731 (1954)

The court cannot take Judicial notice that the hostilities contribute war; it is required by Liberian law that the insurer must prove by evidence that the hostilities constitute war, as that term is used in insurance, law. *Picasso Cafeteria and Spanish Gallery v. Mano Insurance Company,* March 1995, Supreme Court Opinion. It is the Jury which in the light of the standard set by insurance law, must hear evidence and decide whether the hostilities constitute war, as the term is defined by insurance law.

Appendix K

Both Plaintiffs and Defendant have claimed that admissions have been made by each side to the advantage of the other, whether said admission of fact was direct or implied by way of failure to deny an averment of fact. Liberian law is that where the responsive pleader fails to specifically or generally deny a plea of fact, that would be deemed admitted. Section 9.8(2) & (3) civil procedure law, 1 LCLR pages 109-110. In these pleadings, we observe that where the Answer did not specifically deny, it was to generally deny. So the contention of the Plaintiffs on this issue is untenable.

As to the contention of the Defendant that the use of the term "Civil Commotion" or "Civil Crisis" in the Plaintiffs' pleadings is admission that the hostilities which occur in Liberia constitute war, the law is clear that "Civil Commotion" is prolonged civil disturbance, which does not attain the statute of war. Black's Law Dictionary, sixth edition, page 279. So the Defendant's submission on this issue of admission is untenable.

Some of the pleadings raise the issue of the currency of indemnity, that is, whether or not the indemnity should be paid in United States Dollars or Liberian Dollars. The Plaintiffs have submitted in their legal memoranda that Defendant is obligated to pay United States dollars as indemnity, where it can be inferred from expressed language of the agreement or the conduct of the parties that there is an agreement for the indemnity to be paid in United States Dollars. And the Plaintiffs have cited the *United States Trading Company v. Wray* case, October 1993, Term Supreme Court Opinions and March 1994 Term Supreme Court Opinions and the *Bridgeway Corporation v Citibank Case* March 1993 Supreme Court opinions as their reliances. The Defendant did not address the issue in its legal memoranda and counsel for both parties did not argue that issue. So the court

accepts the holding in the two (2) Supreme Court cases cited by the Plaintiffs to govern the issue as to whether or not the indemnity should be paid in the United States dollars or Liberian dollars.

The issue of general damages arising out of an insurance contract was also raised by the pleadings and squarely addressed by the legal memoranda filed by the Plaintiffs. And Plaintiffs relied on the case *Insurance Company of North America v. M.S. Batthi & Sons*, March 1980 Supreme Court Opinions to support its position that general damages may be awarded by the jury in an action of damages for breach of an Insurance contract. This issue was never addressed by the legal memoranda submitted by the Defendant, neither was it argued by the Defendant. So this Court accepts the ruling in the Case *Insurance Comany of North America v. M.S. Batthi & Sons.* March 1980 Supreme Court Opinions, which provides for general damages. And although there is authority to the contrary, it has been held that the intentional bad faith refusal of an insurer to make payments due under an insurance policy constitutes a tortious interference with the protected property interest of the insured, for which damages may be recovered to compensate for all detriment proximately resulting therefrom, including economic loss as well as emotional distress resulting from the conduct or from the economic losses caused thereby. Further, although there is authority to the contrary, it has been held that, under the proper circumstances, punitive or exemplary damages may be recovered from an insurer guilty of wrongful delaying or refusing to make payments due under an insurance contract, in addition to the awarding of consequential damages, 44 Am Jur 2d, Insurance, section 1771. So in the light of the general damages awarded in the *Insurance Company of North America v. M.S. Batthi & Sons* case it should be left with the jury to decide whether the Defendant's conduct was such to warrant the award of general damages.

Appendix K

In view of the foregoing and considering that the legal issues are inter-twined with the facts in each court of the pleadings, no particular count can be dismissed at this stage, based on simply law issues.

Accordingly, the Complaints, Answers and Replies are ruled to trial by a Jury based on the principals of law as stated in this ruling. AND SO ORDERED.

GIVEN UNDER MY HAND AND
SEAL OF THIS COURT THIS
2ND DAY OF DECEMBER A.D. 1996

s/ William B. Metzger, Sr.
William B. Metzger, Sr.
ASSIGNED CIRCUIT JUDGE PRESIDING,
SIXTH JUDICIAL CIRCUIT,
MONT. COUNTY, R.L.

7TH DAY'S CHAMBERS SESSION
MONDAY, DECEMBER 2, 1996
SEPTEMBER TERM A.D. 1996

THE COURT, Mr. Sheriff, call the cases *BRIDGEWAY CORPORATION V. CIGNA WORLDWIDE INSURANCE COMPANY; ALLIANCE MOTOR VS. CIGNA WORLDWIDE INSURANCE COMPANY AND H&A ENTERPRISES VS. CIGNA WORLDWIDE INSURANCE COMPANY;* ACTION OF DAMAGES FOR BREACH OF CONTRACT FOR RULING OF LAW ISSUES. AND SO ORDERED.

THE SHERIFF: Your Honor cases called and the parties present in court. And submits.

Appendix K

REPRESENTATION: The Plaintiffs are represented by the Sherman and Sherman Inc. and present in Court is CLLR. Yarfie F. Williams and CLLR. H. Varney G. Sherman. And submits.

The Defendant is represented by David A.B. Jallah Law Firm and present in Court CLLR Sie-A-Nyenah Yuch and CLLR David A.B. Jallah. And submits.

THE COURT: Representations are noted. And so ordered.

THE COURT: See ruling attached. And so ordered.

To which ruling of your Honour Counsels for Defendant except. And submits.

THE COURT: Exceptions noted. And so ordered. MATTER SUSPENDED.